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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RON LEE, Defendant and Appellant.	B210425 (Los Angeles County Super. Ct. No. ZM002182)

APPEAL from an order of the Superior Court of Los Angeles County. Elizabeth A. Lippitt, Judge. Affirmed.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Ron Lee appeals from an order of commitment entered after a jury found him to be a sexually violent predator (SVP) within the meaning of the Sexually Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et seq).[1] We affirm.

BACKGROUND

The Los Angeles County District Attorney filed a petition seeking to have Lee committed as an SVP. The petition alleged that Lee had received determinate sentences for sexually violent offenses within the meaning of section 6600, subdivisions (b) and (e), namely, convictions in 1988 on three counts of lewd and lascivious acts upon children, in violation of Penal Code section 288, subdivision (a). The petition further alleged that the State Department of Mental Health (Department) had designated two practicing psychiatrists or psychologists (or one of each) who had evaluated Lee and determined that he has a diagnosed mental disorder that makes it likely he will engage in acts of sexual violence without appropriate treatment and custody. The petition alleged that Lee poses a danger to the health and safety of others and is predatory within the meaning of section 6600, subdivisions (c) through (e).

The petition was tried to a jury, which found that Lee is an SVP. On May 16, 2008, the court committed Lee to the Department of Mental Health "for appropriate treatment and confinement pursuant to [section 6604]" for a period of two years, from May 15, 2008, to May 15, 2010. Lee timely appealed.

At trial, the prosecution introduced the testimony of two psychologists, Dr. MacSpeiden and Dr. Vognsen, both of whom had evaluated Lee and concluded that he qualifies as an SVP because he has been convicted of a qualifying offense and suffers from a diagnosed mental disorder (i.e., pedophilia) that makes it likely he will commit sexually violent offenses again in the future if released from custody. The evidence showed that Lee has one conviction from 1985 (in Texas), three convictions from 1988,

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

and one conviction from 1991 for various forms of sexual misconduct with children. (The prosecution relied on only the 1988 convictions as qualifying offenses to support the instant petition.) The prosecution's experts testified that a mental disorder may affect either emotional or volitional capacity and that for sex offenders with as many convictions as Lee, the recidivism rate does not decline with age

The defense introduced the testimony of one psychologist, Dr. Donaldson, who evaluated Lee and concluded that there is insufficient evidence to support a diagnosis of pedophilia. Dr. Donaldson concluded that there was no evidence of impaired volitional control because there was no evidence that Lee had ever tried to control his behavior and failed. Dr. Donaldson also testified that Lee's age, along with other considerations, makes it much less likely that Lee will reoffend than the prosecution's experts indicated.

DISCUSSION

I. "Illegal, Underground Regulations"

"The SVPA 'allows for the involuntary commitment of certain convicted sex offenders, whose diagnosed mental disorders make them likely to reoffend if released at the end of their prison terms.' (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 235.) When officials believe that a person in custody is an SVP, the person must be 'screened by the Department of Corrections and Rehabilitation and the Board of Parole Hearings . . . . in accordance with a structured screening instrument developed and updated by the [Department] in consultation with the Department of Corrections and Rehabilitation.' (§ 6601, subd. (b).) Persons identified as SVP's by this screening instrument are then subjected to a 'full evaluation' by the Department, conducted 'in accordance with a standardized assessment protocol, developed and updated by' the Department. (§ 6601, subds. (b), (c).) The protocol 'shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders.' (§ 6601, subd. (c).) If, as a result of the full evaluation under section 6601, subdivision (c), two mental health professionals conclude that the person qualifies as an SVP, the Department must request the responsible county to file a commitment petition.

(§ 6601, subds. (d), (h).) The person is thereafter entitled to a jury trial on the commitment petition. (§ 6603, subd. (a).)" (*People v. Medina* (2009) 171 Cal.App.4th 805, 811-812, fn. omitted.)

On appeal, Lee raises an argument concerning the "standardized assessment protocol" (§ 6601, subd. (c)) that the Department uses in the pre-petition "full evaluation" process (§ 6601, subd. (b)). "Early in 2008, a petition was filed with the [Office of Administrative Law (OAL)] challenging as underground regulations various provisions of the assessment protocol, which has been issued under the title 'Clinical Evaluator Handbook and Standardized Assessment Protocol (2007),' used by the Department to conduct section 6601 evaluations. (See 2008 OAL Determination No. 19 (Aug. 15, 2008) at pp. 1, 3 <http://www.oal.ca.gov/determinations2008.htm> [as of Feb. 25, 2009] (OAL determination).) The OAL found the challenged provisions invalid, concluding that '[t]he challenged provisions in the "Clinical Evaluator Handbook and Standardized Assessment Protocol (2007)" issued by [the Department] meet the definition of a "regulation" as defined in [Government Code] section 11342.600 that should have been adopted pursuant to the APA.' (OAL determination, at p. 13.)"[2] (*People v. Medina*, *supra*, 171 Cal.App.4th at p. 814.) "[T]he OAL specifically restricted its inquiry to 10 provisions within the protocol . . . ." (*Ibid.*) The OAL's determination that those 10 provisions are invalid underground regulations is not binding on the courts but is entitled to deference. (*Grier v. Kizer* (1990) 219 Cal.App.3d 422, 428, overruled on another ground in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577; see also *People v. Medina*, *supra*, 171 Cal.App.4th at p. 815, fn. 4.)

Lee's sole argument concerning the assessment protocol is as follows: One of the provisions that the OAL determined were invalid relates to "[c]ommitment [e]xtension [e]valuations" and states that, absent "unusual circumstances," an individual who has

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2 The OAL determination is currently available at <http://www.oal.ca.gov/res/docs/pdf/determinations/2008/2008_OAL_Determination_19.pdf >.

been committed as an SVP must finish an appropriate treatment program in order to be eligible for release. (OAL determination, at pp. 2, 8-9.) Lee argues that although this case involves an original commitment rather than a commitment extension, the provision requiring completion of a treatment program "was applied to" him in the trial testimony of the prosecution's experts. On that basis, Lee argues that he did not receive a fair trial, because the evidence used against him was based on an invalid regulation. Lee acknowledges that he did not raise this issue at trial, but he contends that he therefore received ineffective assistance of counsel.

We reject Lee's argument because we conclude that the prosecution's experts did not apply the provision in question to Lee. Lee argues, to the contrary, that "[b]oth experts testified that they followed the [Department's] protocols, which included [the provision concerning completion of a treatment program], in evaluating appellant." The argument fails because, as Lee acknowledges, the provision in question applies only to evaluations for commitment extensions, not to evaluations for original commitments like this one. Thus, if the experts adhered to the Department's protocol, then it does not follow that they applied the provision concerning completion of a treatment program to Lee. Rather, the opposite conclusion would follow—they would not have applied that provision to Lee because this is an original commitment, not a commitment extension.

Lee also argues that Dr. MacSpeiden applied the provision in question to him in the following exchange during direct examination: "Dr. Mac[]Speiden, can you please tell us, by looking at all of the records with regard to Mr. Lee in this case, has he done any sex offender counseling or therapy or treatment with regard to his sex offense?" "There is no record of his undergoing sex offender specific treatment. He was initially required to obtain sex offender treatment in 1986 when he was sentenced in Texas for [a prior] offense. Whether he ever attended that treatment, I don't know. I have no record of it. He may, he may not. [¶] Since he has been—since 1996, December—in either Atascadero or Coalinga State Hospital he has not participated in the treatment there. He has sat in on what's called phase one. Phase one—there are five phases of treatment—

and phase one is you come in, you sit down, you listen to what the treatment is going to be about, and you agree to the treatment, then you begin phase two. He has not progressed beyond phase one. It would be very hard for him because of his narcissism. Mr. Lee does not like to say: I'm a sex offender. That's very hard for him because it makes him feel badly." Lee's argument fails because nothing in the question or Dr. MacSpeiden's answer states or implies that completion of a treatment program is a requirement for Lee's release. Dr. MacSpeiden merely stated what he knew about Lee's participation in treatment programs to date.

With respect to Dr. Vognsen, Lee cites the following exchange from direct examination: "In your experience and based on the record review in this case, did the respondent, Ron Lee, violate the conditions of probation from Texas in associating with children in California who are under the age of 14?" "That's my understanding. Yes. [¶] He also, of course, violated the conditions by not participating in sex offender therapy, which he was ordered to do in Texas as part of his probation sentence." Lee's argument again fails because nothing in the question or Dr. Vognsen's answer states or implies that completion of a treatment program is a requirement for Lee's release. Both the question and the answer expressly concerned only the probation conditions that were imposed on Lee in Texas—Dr. Vognsen testified that Lee was ordered to participate in treatment as part of his "probation sentence" in Texas, but Lee did not comply.

Because the cited portions of the record have no tendency to show that the prosecution's experts relied, in their trial testimony or otherwise, on the provision concerning completion of a treatment program, we reject Lee's argument based on the "illegal, underground regulations."

II. Admission of Hearsay Concerning Nonqualifying Offenses

On direct examination, Dr. MacSpeiden testified in detail, on the basis of various records, concerning the facts underlying Lee's convictions for sexual misconduct with children in Texas in 1985 and in California in 1991. Those crimes were in addition to the three 1988 convictions alleged in the petition as grounds for qualifying Lee as an SVP.

On appeal, Lee argues that Dr. MacSpeiden's testimony concerning the factual details of the 1985 and 1991 offenses should have been excluded as hearsay, and that its admission was prejudicial. We reject the argument on the ground that, assuming that admission of the testimony constituted an abuse of discretion, it was not prejudicial.

Lee argues that the evidentiary errors "undermined the fundamental fairness of" his trial and thus should be evaluated for prejudice under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24, but he contends that the errors are prejudicial even under the more demanding standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. The *Watson* standard applies to evidentiary errors (see, e.g., *People v. Earp* (1999) 20 Cal.4th 826, 878; *People v. Avitia* (2005) 127 Cal.App.4th 185, 194; *People v. Jordan* (2003) 108 Cal.Ap.4th 349, 366; *People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345; *People v. Escobar* (1996) 48 Cal.App.4th 999, 1025), so that is the standard we apply.

It is not reasonably probable that Lee would have obtained a more favorable result if the evidence had been excluded. Lee argues, and we agree, that "[t]he focus of an SVP determination is the present, not the past," that is, the focus is the present likelihood that Lee will engage in acts of sexual violence again if released from custody. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1162.) Lee argues that the admission of Dr. MacSpeiden's testimony concerning the facts of the 1985 and 1991 incidents "placed the emphasis upon [Lee's] past condition and drew the focus away from his present, much altered state." The description of Lee's "present, much altered state" refers to the defense theory that his present age and health make it less likely that he will reoffend.

The argument fails to show a reasonable probability that Lee would have obtained a more favorable result if the evidence had been excluded. The jurors were properly instructed on the elements necessary for finding Lee to be an SVP, which required them to find that he presently has a diagnosed mental disorder that presently makes it likely he will engage in sexually violent behavior if released. It is not reasonably probable that Dr. MacSpeiden's putative "focus" on "the past" confused or otherwise misdirected the jurors so as to alter the outcome of the case. The jurors found Lee to be an SVP because

they found the prosecution's experts more persuasive than the defense expert. The prosecution's experts diagnosed Lee with pedophilia, but the defense expert found insufficient evidence to support such a diagnosis despite Lee's 5 convictions in 7 years for sexual misconduct with children. The defense expert testified that there was no evidence of volitional impairment, but the prosecution's experts testified that a mental disorder can involve *either* volitional *or* emotional impairment. The defense expert also testified that Lee's age makes it much less likely that he will reoffend, but the prosecution's experts testified that for sex offenders with as many convictions as Lee there is no relationship between recidivism and age. Those were the key points on which the jurors had to choose which side to believe. It is not reasonably probable that they would have chosen differently if Dr. MacSpeiden's testimony about the factual details of the 1985 and 1991 incidents had been excluded.

DISPOSITION

The order of commitment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.